BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
CHRISTIAN M. AND LUCILLE V. MC CRIRIE)

For Appellants: J. M. Costello
Price Waterhouse & Co.

For Respondent: Bruce W. Walker
Chief Counsel

Paul J. Petrozzi
Counsel

O P I N I O N

This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Christian M. and Lucille V. McCririe against a proposed assessment of additional personal income tax in the amount of $17,153.20 for the year 1972.

Throughout 1971 appellants, husband and wife, were residents of California* On August 13, 1971, they sold certain securities pursuant to an installment contract. Appellants received approximately 19 1/2 percent of the total sale price in 1971 and the purchaser executed an installment note for the balance, which was to be payable in 1972 with interest.

Appellants' total capital gain on this trailsaction was $362,500. In their 1971 California personal income tax return they made a timely election to report that gain on the installment basis. As cash basis taxpayers they accordingly reported $70,992 of the total gain from the sale, the amount which they actually received in 1971.

In June of 1972 appellants became residents of the State of Washington. Sometime between their move and the end of 1972 they received the second and final payment on the installment note. (Gain included in that installment amounted to $291,508.) In their 1972 California nonresident personal income tax return they did not report as California income any of the gain included in the installment received in 1972. Upon audit of appellants' return respondent revised their income computation, including the $291,508 in income from California sources. 1/

It is undisputed that appellants were entitled to use the installment method (Rev. & Tax. Code, §§ 17577, 17578) in reporting the gain realized from their sale of securities in 1971, and that they made a proper election to do so in their 1971 return. In addition, the parties agree that the interest which accrued on the installment note was properly allocated between California and Washington on the basis of the months of appellants' residency in each state. The primary question remaining for decision, therefore, is whether respondent properly included the $291,508 gain received by appellants in 1972, after they had become residents of Washington, in income subject to tax in California.

1/ Appellants have either conceded the propriety of other audit adjustments made by respondent or their propriety will be established by our decision on the issue raised hy this appeal.

Appellants do not contend that there was no completed sale of the securities in 1971. The gist of their contention is that although the gain may have been realized in 1971, by electing to report that gain on the installment basis they deferred recognition of it, for the most part, until after they had moved from California and had become Washington residents, Under those circumstances, they urge, California lacked jurisdiction to tax the second and final installment of gain received by appellants in 1972, since it no longer had a California source.

Respondent argues that the entire gain from appellants' sale of securities in 1971 constituted income from California sources which was taxable in California, in spite of appellants' change of residency and regardless of their election to use the installment method of reporting the gain. For the reasons hereafter stated, we must agree with respondent.

Nonresidents of California are subject to the California personal income tax on taxable income derived from sources within this state. (Rev, & Tax. Code, §§ 17041, 17951.) In determining what is income from California sources where there has been a change of residency, section 17596 of the Revenue and Taxation Code provides:

> When the status of a taxpayer changes'from resident to nonresident, or from nonresident to resident, there shall be included in determining income from sources within or without this State, as the case may be, income and deductions accrued prior to the change of status even though not otherwise includible in respect of the period prior to such change, but the taxation or deduction of items accrued prior to the change of status shall not be affected by the change.

This accrual treatment applies even though the taxpayer may be on the cash receipts and disbursements accounting basis. (Cal. Admin. Code, tit. 18, reg. 17596.)

Under the provisions of section 17596, the taxability in California of the gain received by appellants in 1972, after they had become Washington residents, will depend upon whether that gain had "'accrued" as income while they were still residents of California. If so, the gain is characterized as having been derived from sources within this state.

Respondent's regulations provide, as do the federal income tax regulations and the case law, that under an accrual method of accounting, income is includible in gross income when all the events have occurred which fix the right to receive such income and the amount thereof can be determined with reasonable accuracy. (Cal. Admin. Code, tit. 18, reg. 17571(a): Treas. Reg. § 1.446-1. (c) (1)(ii); Spring City Foundry Co. v. Commissioner, 292 U.S. 182 [78 L. Ed. 12001, reh. den., 292 U.S. 613 [78 L. Ed. 1472] (1934).) If there are substantial contingencies as to the taxpayer's right to receive, or uncertainty as to the amount he is to receive, an item of income does not accrue until the contingency or events have occurred and fixed the fact and amount of the sum involved. (Midwest Motor Express, Inc., 27 T.C. 167 (1956), affd., 251 F.2d 405 (1958); San Francisco Stevedoring Co., 8 T.C. 222 (1947).) Both this board and respondent have applied these criteria in determining whether or not income had "accrued," within the meaning of section 17596 of the Revenue and Taxation Code,' prior to a change of residency. (See, e.g., Appeal of Edward B. and Marion R. Flaherty, Cal. St. Bd. of Equal., Jan. 6 1969; Appeal of Lee J. and Charlotte Wojack, Cal. St.'Bd. of Equal., March 22, 1971; Appeal of Henry D. and Rae Zlotnick, Cal. St. Bd. of Equal., May 6, 1971; FTB LR 340, Oct. 5, 1970.)

The source of the gain here in question was a sale of securities occurring in 1971. Under the doctrine of mobilia sequuntur personam, those securities had a California situs at the time of the sale since appellants were then residents of California and there is no contention that the securities had acquired a business situs elsewhere. (Miller v. McColgan, 17 Cal. 2d 432 [110 P.2d 419] (1941); see also Christman v. Franchise Tax Board, 64 Cal. App. 3d 751 [134 Cal. Rptr. 7251 (1976).) There is no question that the entire gain from the sale would have been subject to tax in California had appellants not elected to report the gain on the installment basis. The critical inquiry, therefore, is whether their election effected any change in the source of that portion of the gain which was received by appellants in 1972, after they had moved to Washington. We do not believe it did.

Appellants' sale of securities pursuant to an installment contract was a completed transaction in 19'71. The amount of the sale price was a sum certain and there were no substantial contingencies attached to appellants' right to receive that income, albeit on ,a deferred basis.

That being so, the entire gain had "accrued" while appellants were residents of California and no contractual agreement between the parties or an election to defer the reporting of that gain could alter its California source or its taxability in this state. Accordingly, we must sustain respondent's determination that the $291,508 gain received by appellants in 1972 was properly includible in their income from California sources for that year. The authorities relied on by appellants are not persuasive of any other conclusion. None of the cases cited involved a change of residency or any consideration of the source of the gain realized from an installment sale.

Respondent's adjustment to appellants' preference income tax liability for 1972 was based primarily on its inclusion of the aforementioned gain in appellants' California income for that year. Since we have concluded that such inclusion was proper, we must also sustain respondent in this regard.

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

Appeal of Christian M. and Lucille V. McCririe

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Christian M. and Lucille V. McCririe against a proposed assessment of additional personal income tax in the amount of $17,153.20 for the year 1972, be and the same is hereby sustained.

Done at Sacramento, California, this 6th day of December, 1977, by the State Board of Equalization.

, Chairman

, Member

, Member

, Member

, Member